STEWART WEINBERG
DAVID A. ROSENFELD
WILLIAM A. SOKOL
BLYTHE MICKELSON
BARRY E. HINKLE
ANTONIO RUIZ
MATTHEW J. GAUGER
ASHLEY K. IKEDA •
LINDA BALDWIN JONES
PATRICIA A. DAVIS
ALAN G. CROWLEY
KRISTINA L. HILLMAN ••
EMILY P. RICH
BRUCE A. HARLAND
CONCEPCIÓN E. LOZANO-BATISTA
CAREN P. SENCER
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KRISTINA M. ZINNEN
JANNAH V. MANANSALA
MANUEL A. BOÍGUES •••
KERIANNE R. STEELE ••
GARY P. PROVENCHER
EZEKIEL D. CARDER ••••
MONICA T. GUIZAR
LISL R. SOTO
JOLENE KRAMER

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
TELEPHONE (510) 337-1001
FAX (510) 337-1023
WWW.UNIONCOUNSEL.NET

ANTHONY J. TUCCI ••
MICHAEL D. BURSTEIN
ALEJANDRO DELGADO
CAROLINE N. COHEN
XOCHITL A. LOPEZ
CAITLIN E. GRAY
TIFFANY CRAIN ALTAMIRANO ••
RYAN B. KADEVARI
DAVID W. M. FUJIMOTO
ADAM J. THOMAS
PAUL K. PFEILSCHIEFTER
ALEXANDER S. NAZAROV
ERIC J. WIESNER
THOMAS I.M. GOTTHEIL ••••••
JERRY P.S. CHANG •
ANDREA C. MATSUOKA

ROBERTA D. PERKINS, Of Counsel
NINA FENDEL, Of Counsel
TRACY L. MAINGUY, Of Counsel •••••
ROBERT E. SZYKOWNY, Of Counsel
ANDREA K. DON, Of Counsel
LORI K. AQUINO, Of Counsel •
SHARON A. SEIDENSTEIN, Of Counsel

• Admitted in Hawaii
•• Also admitted in Nevada
••• Also admitted in Illinois
•••• Also admitted in New York and Alaska
••••• Also admitted in Florida
•••••• Also admitted in New York

January 3, 2019

VIA ELECTRONIC FILING

Ms. Molly Dwyer, Clerk of the Court
Office of the Clerk
Ninth Circuit Court of Appeals
95 Seventh Street
P.O. Box 193939
San Francisco, CA 94119

Re: National Labor Relations Board v. International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers Union, Local 229
Case No. 17-73210
Citation to Supplemental Authority Pursuant to FRAP 28(j)
Oral Argument Scheduled for February 15, 2019

Dear Ms. Dwyer:

On December 4, this Court decided *United States v. Sineneng-Smith*, No. 15-10614, 2018 U.S. App. LEXIS 34069, in which the Court construed the same phrase at issue in this case. The question was whether a provision of the immigration laws: "8 U.S.C. § 1324(a)(1)(A)(iv) [which] permits a felony prosecution of any person who '*encourages or induces* an alien to come to, enter, or reside in the United States' if the encourager knew, or recklessly disregarded 'the fact that such coming to, entry, or residence is or will be in violation of law.'" *Id.* at *4 (emphasis added).

This Court held that provision swept into its prohibition speech and rejected the government's argument that some conduct was necessary to establish that the person had "encourage[d] or induce[d]." This Court found that the statute was overbroad because it included speech alone.

This Court held the statute restricted a substantial amount of protected speech in relationship to its legitimate legislative sweep on this overbreadth challenge.

This secondary boycott case pending oral argument in a month is a more powerful one for the application of the same First Amendment analysis for exactly the same words, "encourages or induces."

First, this is not an overbreadth challenge, but rather an as applied challenge because the communication of the Union was exclusively speech. Second, in contrast, the conduct which the

Union sought to induce or encourage was perfectly lawful. The Union sought to have workers leave work in protest which is a right any worker possesses. That right to leave work is protected by the Thirteenth Amendment and the "at will" employment doctrine. The National Labor Relations Act does not make it illegal for an employee to leave the job since its proscriptions are imposed only on labor organizations. Finally, the immigration statute applies to any person in contrast to the secondary boycott laws which restrict only some but not all labor organizations.

In summary, *Sineneng-Smith* is dispositive and the application of the secondary boycott law prohibiting inducing or encouraging employees to engage in perfectly lawful conduct utterly fails First Amendment analysis.

Sincerely,

/s/ David A. Rosenfeld

David A. Rosenfeld

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cc: All Counsel (see attached)

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on January 3, 2019, I electronically filed the foregoing CITATION OF SUPPLEMENTAL AUTHORITY PURSUANT TO FRAP 28(j) with the United States Court of Appeals, Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by the Court's CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on January 3, 2019.

/s/ Karen Kempler
Karen Kempler